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SAN MATEO COUNTY

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Clerk of the Superior Court

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10 Facebook, Inc., Mark Zuckerberg, Christopher Cox, Javier
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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF SAN MATEO

13 SIX4THREE, LLC, a Delaware limited liability
14 company,

15 Plaintiff,

16 v.

17 FACEBOOK, INC., a Delaware corporation;
18 MARK ZUCKERBERG, an individual;
19 CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
20 DOES 1-50, inclusive,

21 Defendants.

22 Case No. CIV 533328

23 Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23

24 DEFENDANT FACEBOOK, INC.'S OPENING
BRIEF REGARDING DISCOVERY AND
RELATED PROCEEDINGS

25 Date: August 7, 2019
Time: 9:00 a.m.
Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

26 FILING DATE: April 10, 2015

27 CIV533328
DB
Defendant's Brief re:
1954548



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1 **I. INTRODUCTION**

2 It will soon be a year since Six4Three, LLC (“Six4Three”), its principal, and its legal team
3 flouted the Court’s orders protecting the discovery process, including by disclosing Facebook, Inc.’s
4 (“Facebook”) confidential and highly confidential documents. In the interim, the Court has found that
5 the crime-fraud exception applies, reviewed discovery, and ordered that Six4Three, its principal, and its
6 counsel respond. And yet, discovery has not moved forward. There is a simple reason for the delay:
7 Six4Three, its principal, and its legal team have pulled out every stop to avoid any discovery into the
8 facts surrounding their violations of the Court’s orders. Six4Three and its counsel suddenly developed a
9 conflict as soon as the misconduct was discovered. Six4Three then ignored this Court’s order to find
10 counsel to carry the case forward after months of delay. Instead, Six4Three engaged “limited scope”
11 counsel, whose first order of business was to cause further delay by filing a baseless and facially invalid
12 section 170.6 challenge and subsequent writ, which took the Court of Appeal just one day to summarily
13 reject.

14 Neither Six4Three, its principal, nor its counsel have provided any authority for stopping
15 discovery, let alone for forcing Facebook to pick its remedy before it conducts any discovery. The
16 reason is that there is no such authority. To the contrary, the Court has inherent authority to order
17 discovery into the violation of its orders. Furthermore, even if the Court does not wish to exercise its
18 authority to find out what led to violations of its orders, the scope of discovery is well-defined in
19 California: It is broad and it includes discovery relevant to a pending motion. To get to the bottom of
20 the wrongdoing, Facebook will file a motion for sanctions to start, and sets forth a reasonable schedule
21 for discovery and briefing of that motion here.

22 The Court should enter a briefing schedule for Facebook’s motion for sanctions. That schedule
23 should allow time for discovery and for resolving disputes that will inevitably arise—indeed, that have
24 already arisen. Facebook therefore respectfully requests that the Court set Facebook’s sanctions motion
25 for hearing on November 8, 2019, or a convenient date soon thereafter.

1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. Six4Three, Its Principal, and Its Legal Team Have Obstructed Discovery Into Their**
3 **Own Wrongdoing.**

4 Facebook has been asking for virtually the same documents and depositions since November
5 2018. *See* Decl. of Laura E. Miller in Supp. of Def. Facebook's Mot. to Open Disc. & to Compel, Exs.
6 33–36 (Jan. 8, 2019) ("Miller Jan. 8 Decl."). Then, Facebook sent deposition notices to David Godkin,
7 Stuart Gross, Thomas Scaramellino, and Ted Kramer that demanded testimony and documents. Those
8 notices called for the same information that Facebook demands today. *Compare* Notice of Dep. of David
9 Godkin & Req. for Prod. of Docs. at 2 (Nov. 30, 2018) (requesting production of "communications . . .
10 regarding Facebook's . . . confidential and highly confidential information"), Miller Jan. 8 Decl., Ex. 35
11 with Notice of Subpoenas at 8 (Mar. 22, 2019) (requesting production of communications regarding "the
12 Individual Defendants' anti-SLAPP motion, Six4Three's anti-SLAPP Opposition, the Godkin
13 Declaration or exhibits thereto, or other FACEBOOK confidential or highly confidential information"),
14 Decl. of Zachary G. F. Abrahamson in Supp. of Def. Facebook's Disc. Letter Br. re: Apr. 26, 2019
15 Conference, Ex. 4 (Apr. 19, 2019) ("Abrahamson April 19 Letter Br. Decl."). But after Facebook served
16 requests for documents and depositions, the Court closed discovery in December.

17 The Court opened limited discovery in March to investigate Six4Three and its former legal
18 team's violations of the Court's orders. But since then, Six4Three, Mr. Kramer, Mr. Godkin, Mr. Gross,
19 and Mr. Scaramellino have done everything in their power to prevent that discovery from proceeding.
20 Although Facebook promptly served document and deposition subpoenas on Mr. Godkin and Mr. Gross,
21 and requests for production on Six4Three, Mr. Godkin and Mr. Gross have stood on facially baseless
22 privilege objections. Mr. Kramer has delayed any discovery by first refusing to retain counsel, and then
23 retaining only limited-scope counsel who promptly filed an untimely section 170.6 challenge. Mr.
24 Scaramellino has evaded service of document and deposition subpoenas for months. Six4Three and its
25 former legal team's obstruction campaign has ensured that since the limited document production in
26 January 2019, no discovery whatsoever has taken place in over six months. Decl. of Zachary G. F.
27 Abrahamson submitted herewith ("Abrahamson Decl.") ¶ 2.

1 **First**, Mr. Godkin and Mr. Gross objected to the document requests that the Court specifically
2 ordered in the March 15 Order. Abrahamson April 19 Letter Br. Decl., Exs. 2, 5. Both Mr. Godkin and
3 Mr. Gross refused to produce any allegedly privileged documents, even though the Court had explicitly
4 found that the privilege had been waived pursuant to the crime-fraud exception. *Id.* Ex. 2 at 2–12, Ex. 5
5 at 1–6; Order re: Facebook’s Mot. to Open Disc. & to Compel at 10 (Mar. 15, 2019) (“March 15 Order”).
6 Mr. Gross has been particularly intransigent: during a meet and confer, Mr. Gross’s counsel indicated
7 that Mr. Gross would not produce any documents until the Court of Appeals affirmed this Court’s March
8 15 Order. He said, “[W]e actually need an order from the Court of Appeals before any kind of
9 documents are produced. . . . I don’t think the order from Judge Swope[] is correct.” Abrahamson April
10 19 Letter Br. Decl., Ex. 11 at 16:15–17:1.

11 **Second**, after the Court granted Birnbaum & Godkin’s and Gross & Klein’s motions to withdraw,
12 Birnbaum & Godkin moved for another stay of discovery because Six4Three lacked counsel, even
13 though it no longer represented Six4Three and had spent months claiming that it could not represent the
14 company due to allegedly unwaivable conflicts. *Ex Parte Appl. to Stay Disc.* at 2 (May 6, 2019)
15 (arguing that “good cause exists to stay discovery . . . so that the Plaintiff has counsel to represent its
16 interest Permitting discovery to take place while the Plaintiff is without the benefit of counsel will
17 result in substantial prejudice.”); Mem. of P. & A. in Supp. of Birnbaum & Godkin’s Mot. to be Relieved
18 as Counsel for Pl. Six4Three, LLC at 2–4 (Jan. 8, 2019) (claiming an unwaivable conflict between
19 Birnbaum & Godkin and Six4Three). The Court stayed discovery due to Six4Three’s lack of counsel,
20 and ordered Mr. Kramer to retain counsel to fully represent Six4Three. Order on Birnbaum & Godkin’s
21 *Ex Parte Appl. to Stay Disc.* at 1–2 (June 10, 2019); Order Regarding Retention of Counsel by Pl.
22 Six4Three & Setting Case Mgmt. Conference for July 19, 2019 at 1 (June 19, 2019) (“Counsel Retention
23 Order”).

24 **Third**, Mr. Kramer, Six4Three’s CEO, has delayed finding counsel again and again to prevent
25 discovery or any investigation in this case from proceeding. By November 30, 2018, Mr. Kramer knew
26 that he needed to retain counsel for Six4Three. Hr’g Tr. at 19:6–21, 37:9–11 (Nov. 30, 2018). In June,
27 the Court explicitly found that Mr. Kramer had been “dilatory” in not retaining counsel, and ordered him
28 “to retain counsel so that you can defend against **any** actions that may be pursued by Facebook” by June

1 28, 2019. Counsel Retention Order at 1; Abrahamson Decl. Ex. A, Hr'g Tr. at 8:8–10, 15:3–10 (June 7,
2 2019) (emphasis added); *see also* Abrahamson Decl. Ex. B, Hr'g Tr. at 15:15–18 (July 19, 2019) (“I
3 directed your client [Six4Three] to obtain counsel to generally represent the corporation so that we could
4 move forward.”).

5 Mr. Kramer did not find full-scope representation for Six4Three by June 28, 2019. Instead, he
6 retained Macdonald Fernandez LLP (“Macdonald Fernandez”) to represent Six4Three in a limited scope
7 capacity. Notice of Ltd. Scope Representation § 2.c. (July 2, 2019). Six4Three’s limited-scope counsel
8 immediately filed a facially untimely section 170.6 challenge against Judge Swope. Request for
9 Peremptory Challenge pursuant to Civ. Proc. Code § 170.6 (July 3, 2019). Even though the challenge
10 was denied, Six4Three’s limited-scope counsel successfully delayed the case again by claiming that a
11 stay was necessary because it intended to file a writ on the section 170.6 challenge. Case Mgmt.
12 Statement by Pl. Six4Three, Attach. 1 (July 12, 2019). Six4Three filed its writ on July 18, and at the
13 next day’s case management conference, the Court set a further case management conference for August
14 7 and gave Six4Three until then to retain full-scope counsel to represent it in this litigation. *See*
15 generally Pet. for Writ of Mandate, *Six4Three, LLC v. Superior Court (Facebook, Inc.)*, No. A157817
16 (1st Dist. Ct. App. July 18, 2019) & Abrahamson Decl. Ex. B at 3:3–10, 23:3–7. Less than two hours
17 after the July 19 case management conference concluded, and approximately 24 hours after Six4Three’s
18 limited-scope counsel filed the writ petition, the Court of Appeals denied the writ in a single sentence.
19 *See* Abrahamson Decl., Ex. C. But by then, Six4Three had managed to delay the proceedings yet again.

20 **Finally**, Mr. Scaramellino and his counsel Mr. Russo have obstructed discovery by preventing
21 Facebook from serving document and deposition subpoenas on Mr. Scaramellino, notwithstanding Mr.
22 Scaramellino’s signed consent to the jurisdiction of the San Mateo Superior Court for the purposes of
23 enforcing the Protective Order. *See* Decl. of Thomas Scaramellino, Ex. 1 (Mar. 14, 2019). Mr. Russo
24 has refused to accept service on behalf of his client. Abrahamson Decl. ¶ 3. Mr. Russo has refused to
25 provide a genuine service address for Mr. Scaramellino, instead directing Facebook to a “general
26 address” for a complex of summer vacation homes that was “basically empty” in the dead of winter and
27 nearly impassable “due to the accumulated mud.” Abrahamson Decl., Ex. D. Mr. Russo has refused to
28 provide a business address where Mr. Scaramellino can be served, leaving Facebook to try service at the

1 last known address of Mr. Scaramellino's last business, where the current tenant stated that she had been
2 living there since November, did not know of Mr. Scaramellino or the business, and that there was no
3 business at that address. Abrahamson Decl. Ex. E. Before the Court stayed discovery, Facebook had
4 attempted to serve Mr. Scaramellino multiple times over the course of four weeks at four addresses in
5 two states using four different process servers. Abrahamson Decl. ¶ 4. At this point, Mr. Scaramellino's
6 refusal to accept service through his counsel or to provide, through counsel, a genuine address for
7 service, can only be a deliberate effort to evade service and prevent Facebook from taking discovery
8 from him about his involvement in the improper disclosure of Facebook's confidential and highly
9 confidential information.

10 **B. Facebook Continues to Suffer Real Prejudice While Discovery Is Stayed.**

11 In addition to the risk that memories will fade and that Mr. Godkin, Mr. Gross, Mr. Scaramellino,
12 and Mr. Kramer will claim to have forgotten relevant information by the time that Facebook is finally
13 permitted to depose them, the ongoing delay in discovery causes real harm to Facebook. Discovery
14 would provide essential information to Facebook: What confidential and highly confidential information
15 did Six4Three and its former legal team disclose in violation of the Stipulated Protective Order and other
16 Court orders? To whom did Six4Three and its former legal team disclose that information? Who has
17 that information?

18 At the May 10, 2019 hearing, the Court ordered all parties to abide by the Protective Order and
19 the sealing orders issued on November 1. Hr'g Tr. at 9:21–11:4 (May 10, 2019). But on July 12, nearly
20 30 exhibits from the Declaration of David S. Godkin in Opposition to Defendants' Special Motions to
21 Strike (anti-SLAPP) were posted to a github site, where anyone could view and download them. See
22 <https://github.com/BuxtonTheRed/btrmisc/tree/master/docs%20used%20for%20Computer%20Weekly%201st%20article>. All of the documents were designated confidential or highly confidential. Abrahamson
23 Decl. ¶ 5. Several of these documents had not been publicly disclosed before. *Id.* The ongoing stay of
24 discovery means that unauthorized individuals will continue to publicly disclose Facebook's confidential
25 and highly information, and the Court's Stipulated Protective Order will be rendered "moot and a mere
26 exercise." Hr'g Tr. at 10:17–18 (May 10, 2019).

1 **C. The Evidence Facebook Has Unearthed Without Discovery Supports Targeted**
2 **Discovery Necessary for Resolution of a Sanctions Motion.**

3 The Court has already found that Facebook made a *prima facie* showing that Six4Three and its
4 former legal team, including Mr. Godkin, Mr. Kruzer, Mr. Gross, and Mr. Scaramellino, disclosed
5 Facebook's confidential and highly confidential information in violation of multiple Court orders. *See*
6 March 15 Order at 10. The evidence cited in the Court's Order provides a roadmap for the discovery that
7 will inform Facebook's sanctions motion. There were multiple written communications "that involve
8 Six4Three, its principal Mr. Kramer, and its counsel, including Mr. Godkin, Mr. Gross, Mr. Kruzer, and
9 Mr. Scaramellino, revealing or discussing confidential information produced by Facebook with third
10 parties and using a retained expert as a source for the news media . . ." *Id.* at 4. For example, Mr.
11 Godkin sent communications to third parties, including government entities, that "analyze[d] in detail"
12 Facebook's confidential information. *Id.* at 3. He not only summarized "confidential information
13 obtained from Facebook," he "went further by inviting the recipient[s] to find an 'appropriate
14 mechanism' to permit disclosure" of Facebook's confidential and highly confidential information. *Id.* at
15 4. Mr. Gross was likewise privy to "conversations with a third party prior to" the Digital, Culture, Media
16 and Sport ("DCMS") Committee's publication of Facebook's confidential information that "reveal[ed] or
17 discuss[ed] Facebook's confidential information." *Id.* at 6.

18 There were further violations of the Court's orders in addition to the e-mail communications
19 improperly disclosing Facebook's confidential information to third parties. Most obviously, Mr. Kramer
20 disclosed Facebook's confidential information to Mr. Collins of the DCMS Committee. *Id.* at 5. Before
21 doing so, he "utilized the services of counsel to aid in committing a crime or fraud" and "communicated
22 with Mr. Collins on finding an 'appropriate mechanism' to disclose to DCMS" Facebook's confidential
23 information." *Id.* at 7. Mr. Kramer's disclosure to the DCMS Committee was facilitated by Mr. Godkin
24 and Mr. Scaramellino's improper provision of Facebook's confidential and highly confidential
25 information to people that were not authorized to receive it. Mr. Godkin admitted he was "responsible
26 for the safekeeping of" Facebook's confidential and highly confidential information, and the Court found
27 that "[o]ne can only conclude that Birnbaum & Godkin caused Facebook's confidential and highly
28 confidential information to be uploaded on Six4Three's Dropbox." *Id.* at 9–10. It was, of course, from

1 Six4Three's Dropbox that Mr. Kramer was able improperly to access and share Facebook's confidential
2 and highly confidential information with the DCMS Committee. Decl. of Theodore Kramer in in [sic]
3 Supp. of Pl.'s Br. in Resp. to Nov. 20, 2018 Order ¶ 18 (Nov. 26, 2018). Mr. Godkin also improperly
4 provided Facebook's highly confidential information to Mr. Scaramellino in violation of the Stipulated
5 Protective Order, and supervised Mr. Scaramellino's work on Six4Three's legal team. March 15 Order
6 at 6–7, 12–13. The Court explicitly found that Mr. Scaramellino's conduct "in this action is imputed on
7 Birnbaum & Godkin, LLP." *Id.* at 7.

8 To state the obvious, the foregoing information is the tip of the iceberg. It makes out a prima
9 facie case of crime fraud, and it shows the way for the discovery, described below, which the Court has
10 already reviewed and approved to get to the bottom of what happened here.

11 **III. ARGUMENT**

12 **A. The Court Has Jurisdiction to Order Discovery, As It Has Already Held.**

13 As Facebook has previously explained, the parties' pending anti-SLAPP appeals do not strip the
14 Court of power to investigate Six4Three's violations of the Court's Orders. *See* Def. Facebook's Mem.
15 P. & A. in Supp. of Mot. to Open Disc. & to Compel at 9:13–11:9 (Jan. 8, 2019) ("Mot. to Open Disc.").
16 Section 916(a) only stays proceedings "upon the judgment or order appealed from or upon the matters
17 embraced therein or affected thereby[.]" Civ. Proc. Code § 916(a). An appeal "does not divest the court
18 below of jurisdiction to determine ancillary or collateral matters which do not affect the judgment on
19 appeal." *Silver v. Gold*, 211 Cal. App. 3d 17, 26 (1989) (internal quotation marks omitted); *see also URS*
20 *Corp. v. Atkinson/Walsh Joint Venture*, 15 Cal. App. 5th 872, 877 (2017) ("the appeal automatically
21 stayed enforcement of the order disqualifying counsel, but not all trial court proceedings.").

22 Six4Three's violations of the Court's orders are collateral to the parties' appeals. Those appeals
23 consider whether Facebook and the Individual Defendants' alleged conduct comes within the scope of
24 California's anti-SLAPP law and other statutes, and (in an appeal filed December 26, 2018) whether the
25 Court properly sealed or struck the voluminous documents Six4Three submitted in connection with its
26 anti-SLAPP opposition brief. The discovery that Facebook seeks has nothing to do with the merits of
27 these appeals. Instead, Facebook wants to know the full scope and extent to which Mr. Kramer, Mr.
28 Scaramellino, Mr. Godkin, Mr. Gross and Mr. Kruzer breached this Court's orders, and how they did it.

1 See Miller Jan. 8 Decl., Ex. 44, Case Mgmt. Order No. 17 ¶ 1.a (filed Dec. 7, 2018) (“The Court re-opens
2 discovery for the limited purpose of [Six4Three and its agents’] disclosure, dissemination, distribution
3 and/or destruction, or attempt thereto, of Defendant Facebook, Inc.’s confidential and highly confidential
4 documents and violation of the Court’s orders Merits based discovery remains stayed.”).

5 **B. The Court Has Inherent Authority to Enforce and Investigate Six4Three’s Violations
6 of the Court’s Orders.**

7 The Court has inherent authority to ensure that its orders are followed. That inherent authority
8 derives from California’s constitution. *See Walker v. Superior Court (Residential Constr. Enter.),* 53
9 Cal. 3d 257, 267 (1991) (“[I]t is established that the inherent powers of the courts are derived from the
10 Constitution”); *Branson v. Sharp Healthcare, Inc.*, 193 Cal. App. 4th 1467, 1476 n.4 (2011) (“**The power
11 to enforce their decrees is necessarily incident to the jurisdiction of courts.** Without such power, a
12 decree would, in many cases, be useless.”) (citation omitted) (emphasis added); *Stephen Slesinger, Inc. v.
13 Walt Disney Co.*, 155 Cal. App. 4th 736, 761 (2007) (holding that court’s inherent authority included
14 power to sanction for deliberate and egregious misconduct). The Code of Civil Procedure confirms and
15 complements that authority. For example, section 128 lends the Court the power to “compel obedience
16 to its judgments, orders, and process” and to “control in furtherance of justice, the conduct of . . . persons
17 in any manner connected with a judicial proceeding before it[.]” Civ. Proc. Code § 128(a)(4)–(5).

18 The Court’s power to enforce is buttressed with a power to investigate. That authority springs in
19 part from section 187 of the California Code of Civil Procedure, which provides that, “[w]hen
20 jurisdiction is, . . . conferred on a Court . . . **all the means necessary to carry it into effect are also
21 given[.]**” Civ. Proc. Code § 187 (emphasis added). In addition, section 128(a)(6) authorizes the Court
22 compel testimony. *See Civ. Proc. Code § 128(a)(6).* Beyond these statutory grants, multiple published
23 opinions confirm the Court’s inherent authority to investigate. *See, e.g., Johnson v. Banducci*, 212 Cal.
24 App. 2d 254, 260 (1963) (“One phase of [the inherent] power ‘necessary to the orderly and efficient
25 exercise of jurisdiction’ is **the power to obtain evidence** upon which the judgment of the court may
26 rest.”) (citations omitted) (emphasis added); *James v. Superior Court*, 77 Cal. App. 3d 169, 175 (1978)
27 (noting that “[c]ourts have the inherent power to create new forms of procedure in particular pending
28 cases” and holding that court’s inherent authority included power to hold a competency hearing).

1 Accordingly, the Court is amply equipped to investigate Six4Three's misconduct to enforce its orders.

2 Critically, none of these powers requires Facebook, the Court, or anyone else to enumerate—in a
3 pleading or otherwise—the scope of conduct under investigation. Accordingly, so long as the discovery
4 sought is necessary for the exercise of the Court's jurisdiction, the Court has authority to order it.

5 Facebook's requested discovery is appropriate. Facebook seeks discovery specifically tailored to
6 safeguard the integrity of this Court's orders. The Court already has devoted significant time to
7 reviewing and approving the discovery, which targets only a handful of individuals already subject to the
8 Court's jurisdiction. March 15 Order at 13:12–15 (granting Facebook leave to serve discovery requests
9 attached to Court's order). The search terms included in Facebook's proposed review protocol target
10 documents reflecting Six4Three's communications with third parties not entitled to review confidential
11 and highly confidential information. *See, e.g.*, Defs.' Case Mgmt. Statement, Ex. B at 6–8 (July 12,
12 2019). Documents returned from the search would bear directly on the question whether Six4Three, its
13 principal, or its legal team frustrated the exercise of the Court's jurisdiction. Similarly, as Facebook has
14 repeatedly explained and the Court's March 15 Order found, depositions of members of Six4Three's
15 legal team—including David Godkin, Stuart Gross, and Thomas Scaramellino—are critical to
16 understanding the scope of Six4Three's violations. *See, e.g.*, Mot. to Open Disc. at 14:2–15:24
17 ("Depositions of Mr. Kramer and the Legal Team are Essential"); March 15 Order at 10:12–13:1 (finding
18 that "references in emails to conference calls and oral communications involving Six4Three's counsel, its
19 legal team, and Mr. Kramer . . . warrant these depositions"). So even without a reason for **Facebook** to
20 obtain the requested discovery, the Court would be well within its independent right to do so.

21 **C. Discovery Is Also Critical to a Sanctions Motion, Which Facebook Will File.**

22 Even if the Court's inherent authority were not sufficient to compel the requested discovery—it
23 is—Facebook would be entitled to that discovery under California's Civil Discovery Act. That act states
24 plainly that, "any party may obtain discovery regarding any matter, . . . that is relevant to . . . **the**
25 **determination of any motion** made in that action[.]" Civ. Proc. Code § 2017.010 (emphasis added).
26 Those provisions are "construed liberally in favor of disclosure." *Emerson Elec. Co. v. Superior Court*
27 (*Grayson*), 16 Cal. 4th 1101, 1107 (1997) (citation omitted).

1 It is rational, appropriate, and common to order discovery before a sanctions motion. *See, e.g.*,
2 Abrahamson Decl., Ex. F ¶ 2 (order from San Francisco Superior Court ordering that, “Defendants’
3 anticipated motion for sanctions will be set at a later time after counsel takes the depositions of Mr.
4 Kevin Halpern and Mr. James Barnes.”). Here, the requested discovery is relevant to Facebook’s motion
5 for sanctions—including monetary, issue, evidence, and terminating sanctions—pertaining to the
6 violation of this Court’s orders. To state the obvious, there is no shortage of sanctions that follow
7 Six4Three’s, Mr. Kramer’s, and its counsel’s conduct here. Facebook’s requested discovery relates to
8 the scope of disclosures and access granted to Facebook’s confidential and highly confidential
9 information in violation of the Court’s orders. Depositions of Six4Three and its legal team will reveal
10 information about the who, what, why, where, and when as to the DCMS (and any other) disclosures—
11 information, again, well within the universe of facts relevant to a motion for sanctions.

12 As with investigation pursuant to the Court’s authority, there is no requirement that Facebook file
13 a motion *first* and seek discovery only afterward. Certainly, Facebook is aware of no case that stands for
14 that result. To the contrary, at least one federal court has ordered document production and depositions
15 to ascertain the scope of conduct later subject to sanction. *See Apple, Inc. v. Samsung Elecs. Co.*, No.
16 5:11-cv-01846-LHK (PSG), 2014 WL 12596470, at *1 (N.D. Cal. Jan. 29, 2014).

17 And contrary to the repeated representations of counsel for Mr. Kramer and Mr. Scaramellino,
18 *Koehler v. Superior Court*, 181 Cal. App. 4th 1153 (2010), has *nothing to do with procedural*
19 *prerequisites to sanctions-related discovery*. *Koehler* arose from a habeas corpus challenge to an
20 indirect contempt order without an initiating affidavit. *Id.* at 1165. The petitioner challenged the
21 contempt order on several procedural grounds, including that the trial court failed to present an initiating
22 affidavit, *id.* at 1169, and failed to personally serve the petitioner. *Id.* Those procedural defects, the
23 appeals court held, deprived the petitioner of due process and rendered the contempt order invalid. *Id.* at
24 1171. There was no discussion of discovery, nor of any procedural prerequisites to obtaining discovery
25 when relevant to a potential sanctions motion. Notably, *Koehler* affirms the process that Facebook is
26 asking for here. Prior to the multiple rounds of contempt proceedings, the court heard and granted a
27 motion for discovery sanctions. *Id.* at 1158. Far from prohibiting such a sequence, the *Koehler* opinion
28 endorses it. The holding in *Koehler* that due process demands strict compliance to the procedural

1 mechanics of contempt proceedings in California is not a question presented here, where neither
2 Facebook nor the Court has initiated contempt proceedings against Six4Three or its legal team.

3 **D. The Status of Six4Three's Representation by Counsel Is Not a Bar to Discovery.**

4 By the time the Court hears the parties' briefs on these issues, the question of Six4Three's
5 representation by counsel should not bar discovery. This Court has repeatedly ordered Six4Three to
6 retain full-scope representation so that the case may proceed. At the June 6, 2019 case management
7 conference, the Court explained to Six4Three's principal that the company might need "second counsel if
8 you don't have a one-size-fits-all firm that handles corporate representation in litigation as well as a
9 contempt citation." Abrahamson Decl. Ex. A, Hr'g Tr. at 4:25–5:1 (June 7, 2019); *see also id.* at 8:8–10
10 (ordering Mr. Kramer "to retain counsel so that [Six4Three] can defend against any actions that may be
11 pursued by Facebook."). Following that hearing, the Court issued a written order finding that
12 Six4Three's principal "had been dilatory in retaining counsel" and ordering Six4Three to retain counsel
13 by June 28, 2019. *See* Counsel Retention Order at 1.

14 But instead of discharging that duty, Six4Three played games. Six4Three's principal submitted a
15 sworn declaration representing to the Court that he had "executed a retainer agreement . . . for
16 representation of Plaintiff ***in the present matter.***" Decl. of Theodore Kramer re: Order re: Retention of
17 Counsel by Pl. Six4Three ¶ 2 (July 1, 2019) (emphasis added). But the law firm that then appeared—
18 Macdonald Fernandez—"strictly limited" its representation in a notice filed July 2, 2019: "We will
19 defend a motion for sanctions ***if brought by the defendants . . .***," the firm said, "and we will appear at
20 the case management conference set for July 19, 2019, if it goes forward." Notice of Ltd. Scope
21 Representation ¶ 2.c (July 2, 2019) (emphasis added).

22 The July 19 conference went forward, and in light of Six4Three's failure to obtain full
23 representation, the Court explained that "several weeks ago I had ordered Mr. Kramer to retain counsel
24 for the express purpose of representing Six4Three with regard to the discovery issues." Abrahamson
25 Decl. Ex. B, Hr'g Tr. at 6:3–8 (July 19, 2019); *see also id.* at 15:15–18 ("[The Court]: I directed your
26 client to obtain counsel to generally represent the corporation so that we could move forward.").
27 Six4Three's response—the limited scope representation—left the parties unable to "move forward with
28 the case." *Id.* at 13:21–14:3. So the Court continued the case management conference until August 7,

1 and told Six4Three that “provided that there is full representation, the discovery will go forward from
2 that day.” *Id.* at 23:5–8. Accordingly, by August 7, Six4Three should have lawyers who can respond to
3 the requested discovery.

4 Even if Six4Three fails to secure counsel, discovery may go forward. As Facebook has argued
5 previously, and contrary to the arguments of Six4Three’s former lawyers, discovery *may* proceed against
6 unrepresented corporations. *See, e.g., Albrecht v. Ostler*, No. E054088, 2013 WL 444965, at *2 (Cal. Ct.
7 App. 2013); *Goulatte v. Cty. of Riverside*, No. CV 11-1740 DDP(JCx), 2012 WL 12886968, at **2–3
8 (C.D. Cal. Aug. 2, 2012); *Morgan v. CSW Inc.*, No. 16-C-1283, 2017 WL 3028128, at *1 (E.D. Wis.
9 May 12, 2017). Moreover, as the Court and parties previously discussed, certain avenues of discovery do
10 not raise the privilege questions that the Court previously found significant. *See* Hrg. Tr. 23:23–26 (May
11 10, 2019) (“[Defendants’ counsel]: They could have the world’s greatest counsel, they’re not going to be
12 able to assert privilege over communications between Mr. Kramer and the press or Mr. Scaramellino and
13 the press.”).

14 **E. Facebook Requests a Briefing Schedule for a Motion for Sanctions.**

15 Notwithstanding that discovery may proceed without a pending motion for sanction or contempt,
16 Facebook requests that the Court set a briefing schedule to ensure this inquiry proceeds without delay.

17 EVENT	18 DATE
19 Deadline for Facebook to serve/file motion for sanctions	October 15, 2019
20 Deadline for any oppositions to Facebook’s motion for sanctions	October 28, 2019
21 Deadline for any reply in support of Facebook’s motion for sanctions	November 1, 2019
22 Hearing on Facebook’s motion for sanctions	9:00 a.m. on November 8, 2019

23
24 This schedule allows two months for discovery and sets an evidentiary hearing on Facebook’s
25 motion for November 8, 2019 or thereafter at the Court’s convenience.
26
27
28

1 **IV. CONCLUSION**

2 The Court should open discovery on August 7, 2019 and enter the sanctions briefing schedule set
3 forth in Facebook's proposed order.

4

5 Dated: July 24, 2019

DURIE TANGRI LLP

6 By: _____



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PROOF OF SERVICE

I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On July 24, 2019, I served the following documents in the manner described below:

**DEFENDANT FACEBOOK, INC.'S OPENING BRIEF REGARDING DISCOVERY
AND RELATED PROCEEDINGS**

- (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.

BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from cortega@durietangri.com to the email addresses set forth below.

On the following part(ies) in this action:

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1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct. Executed on July 24, 2019, at San Francisco, California.

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4 Christina Ortega
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